PP

v.

RAMASAMI SIMMATHRI & ORS AND ANOTHER APPLICATION (NO 2)

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[CRIMINAL TRIAL NOS: PCT 45-7-2000 & 45-8-2000]
13 JULY 2001

CRIMINAL PROCEDURE: *Report or certificate - Post mortem report - Chemist report - Forensic pathologist report - Dental report - DNA profile report - Application for - Whether accused has right to such reports - Criminal Procedure Code, ss. 51, 399*

CRIMINAL PROCEDURE: *Police investigation - Statement by accused - Application for - Whether accused has right to such statement - Criminal Procedure Code, ss. 51, 112 - Evidence Act 1950, ss 74, 76*

EVIDENCE: *Documentary evidence - Public document - Application for - Pre-requisites to fulfil before accused is entitled to such document - Evidence Act 1950, ss. 74, 76*

This was an application by the defence that the prosecution or the authority concerned be ordered by the court to supply the defence copies of the following documents pursuant to ss. 74 and 76 of the Evidence Act 1950 ('the Act') and s. 51(1) of the Criminal Procedure Code ('the CPC'): (i) all statements recorded under s. 112 of the CPC irrespective from whom the statements were recorded; (ii) post-mortem reports on the five deceased persons in this case; and (iii) reports by the experts to be called in this case, especially experts on osteology and on DNA profiling.

Held:

[1] Statements recorded under s. 112 of the CPC are public documents and cannot be supplied to the defence unless the statements were recorded from the accused persons themselves. Furthermore, the statement can only be supplied to the particular accused person from whom the statement was recorded. An accused person is not entitled to be supplied with his co-accused's statement. (p 693 d-e)

[2] Section 399 of the CPC which deals with the admissibility of reports of experts such as post-mortem report, chemist report, DNA profiling report and dental report provides that such a report is only admissible in evidence if a copy of the report has been served on the accused person not less than ten clear days before the commencement of the trial. Section 399

CPC therefore requires prior service of the report on the accused person as a precondition which must be satisfied before the prosecution can tender the report in evidence as part of its case. (p 694 e & f)

[3] The success of an application under s. 51 CPC depends on whether it was made before the commencement of the trial. If the application was made before the commencement of the trial, the court has an absolute discretion to entertain the application bearing in mind the overriding justice of the case. An accused person should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. He is entitled to documents or materials specified or referred to in the charge – but is not entitled to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in civil proceedings. He is also not entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge. If the application was made in the course of trial then the rule of relevancy must be strictly enforced. This means that anything that may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced. The rule of relevancy means that the materials or documents asked for must be relevant to the issues for adjudication. (pp 696 h-697 c)

[4] Section 399 of the CPC is therefore both permissive (because of the word 'may') and mandatory (because of the prerequisites for prior service of the reports). It, limits the discretion of the court under s. 51(1) of the CPC in that if the prosecution does not wish to tender the reports as part of its case, the hands of the judge are tied because these reports no longer form part of the evidence for the prosecution. It therefore becomes unnecessary or undesirable for the reports to be produced at that stage of the trial since their production serves no purpose to the trial at that stage. Consequently s. 51(1) of the CPC cannot be invoked by the defence to apply to the court to order their production. (p 694 g-i)

[5] On the facts and circumstances of this case, the post-mortem reports were not relevant to the issues for adjudication in this trial particularly the issue of the cause of death and identification of the five deceased persons whose names appeared in the charge because their makers would be called by the prosecution to adduce oral evidence. (p 696 e)

[6] An accused person relying on his common law right to inspect a document must satisfy the court first that it is a public document within the meaning of s. 74 of the Act and that he has an interest in the document and that he requires inspection and a certified true copy of that document for the protection of his interest. To satisfy the court he must show the following: (i) it is a first information report; or (ii) a statement

made by him such as a cautioned statement; or (iii) his uncautioned statement; or (iv) concerns him directly eg his medical report; or (v) any other like document which is admissible in evidence either for the prosecution or the defence. (p 699 d-i)

[Application dismissed.]

Case(s) referred to:

Anthony Gomez v. Ketua Polis Daerah Kuantan [1977] 2 MLJ 24 ***(foll)***
Bryant v. Dickson [1946] AC 146 ***(refd)***
Hj Abdul Ghani Ishak v. PP [1980] 2 MLJ 196 ***(refd)***
Kameshwar Singh v. Province of Bihar AIR [1950] Pat 392 ***(refd)***
Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur [1979] 1 MLJ 49 ***(foll)***
Lakhmi v. Haider 3 CWN 268n ***(refd)***
Muthusamy v. PP [1948] 14 MLJ 57 ***(refd)***
PP v. Raymond Chai Kim Chwee & Anor [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 ***(foll)***
Toh Kong Joo v. Penguasa Perubatan Hospital Sultanah Aminah, Johore Bahru [1990] 1 CLJ 1001; [1990] 3 CLJ (Rep) 288 ***(dist)***

Legislation referred to:

Criminal Procedure Code, ss. 51(1), 112, 179(1), 108A, 399(3)
Evidence Act 1950, ss. 3, 74, 76, 77, 145

Evidence Act 1872 [India], s. 3

Other source(s) referred to:

NS Bindra, *Interpretation of Statutes*, 1997, 8th edn, p 576
Sarkar, *Law of Evidence*, 15th edn, vol 1, p 85
Sohoni, *The Code of Criminal Procedure 1973*, 1998, 19th edn, vol 5, para 25, p 388

For the defendants - DP Vijandran; M/s DP Vijandran & Assoc
For the prosecution - Othman Abdullah (Abdul Rahim Mohd Nor)

Reported by Mariette Peters-Goh

JUDGMENT

Su Geok Yiam JC:

This is an oral application made to the court by the defence that the prosecution or the authority concerned be ordered by the court to supply to the defence, copies of the following documents:

1. all statements recorded under s. 112 of the CPC in connection with this case irrespective of from whom the statements were recorded;
2. post-mortem reports on the five deceased persons in this case;
3. reports by experts to be called in this case, especially experts relating to osteology ie identification of human remains and experts relating to DNA profiling tests.

either under the common law if the documents are public documents pursuant to s. 74 and 76 of the Evidence Act 1950 or alternatively under s. 51(1) of the CPC in order to enable the accused persons to prepare their defence. The defence say that the accused persons have an interest in these documents and that the supply of copies of the documents is reasonably necessary for the protection of such interests. Alternatively the defence say that these documents are relevant to the issues for adjudication at the trial and therefore their production is necessary or desirable for the purpose of this trial.

After having heard lengthy oral submissions from both the learned leading defence counsel, Mr. D.P. Vijandran, and the learned leading DPP, Encik Othman bin Abdullah, I am satisfied that the application should be dismissed on the following grounds:

I shall deal first with the 1st category of documents applied for ie all statements recorded under s. 112 of the CPC in connection with this case irrespective of from whom.

It is settled law that these documents are public documents and that they cannot be supplied to the defence unless the statements concerned have been recorded from the accused persons themselves. In the case of the latter, the statement can only be supplied to the particular accused person from whom the statement was recorded. An accused person is not entitled to be supplied with a copy of his co-accused's statement. The rationale is because of the real fear or danger of potential witnesses who have given information against them being tampered with.

This is crystal clear from the case of *Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur* [1979] 1 MLJ 49 which was decided by the highest court in the land, ie the Federal Court.

In fact Mr. Vijandran who has cited this authority, has most graciously conceded that this authority is against him. He is absolutely correct. According to the doctrine of *stare decisis* which is a latin maxim meaning the doctrine to stand upon decisions or to abide by precedents which is practised in our system of administration of justice by the courts, the decision is binding on me.

That in short disposes of the application by the defence for the 1st category of documents.

I shall now proceed to deal with the second category of documents applied for, ie the post-mortem reports of the five deceased persons in this case.

At the outset I must place on record that I find the arguments put forth by Mr. Vijandran to be highly persuasive. He has dealt with the relevant cases in a most fair, lucid and comprehensive manner and all his points have been very well argued. He has carefully and meticulously taken the court through

the cases to show how the law has developed since the case of *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24 was decided by the Federal Court in 1977.

The defence say they have an interest in the reports and they require copies of these reports which are necessary or desirable to enable the accused persons to prepare for their defence for the purposes of this ongoing trial. The reason is because the opening statement of the prosecution throw little light on the case which the defence have to meet. The defence also say that the supply of copies of the reports will not prejudice the prosecution's case. Neither will it give rise to any real danger or fear that the expert witnesses may be tampered with as they are professionals.

Had not the learned DPP relied on s. 399 of the CPC the court would have been persuaded to decide in favour of the defence. Unfortunately for the defence, the court is constrained by the provisions of s. 399 of the CPC which override and prevail over the common law that has been held by the courts to apply by virtue of ss. 74 and 76 of the Evidence Act 1950 in respect of other documents.

Having examined s. 399 of the CPC I agree with Mr. Vijandran that the provision deals with the admissibility of reports of experts such as post mortem reports, chemist reports, DNA profiling reports, dental reports and the like. It provides that such a report is only admissible in evidence if a copy of the report is served on the accused persons not less than ten clear days before the commencement of the trial.

In other words the section requires the prior service of the reports on the accused person as a precondition which must be satisfied before the prosecution can tender the reports in evidence as part of the prosecution's case. I am of the view that s. 399 provides the legal admissibility for such reports subject to prior service of the reports on the accused persons not less than ten clear days before the trial begins.

In my view s. 399, which is both permissive (because of the word "may") and mandatory (because of the pre requisite for prior service of the reports) in nature, limits the discretion of the court under s. 51(1) of the same code in that if the prosecution does not wish to tender the reports as part of the prosecution's case, the hands of the judge are tied because these reports no longer form part of the evidence for the prosecution. A *fortiori*, it becomes unnecessary or undesirable for the reports to be produced at this stage of the trial since their production serves no purpose to the trial at this stage. Consequently s. 51(1) of the CPC cannot be invoked by the defence to apply to the court to order their production. If invoked the court will refuse to issue the summons sought for. This is because the words "necessary or desirable for the purposes of any ... trial" in s. 51(1) qualify the preceeding words "Wherever any court ... considers that the production of any ... document is".

I am fortified in my view by the following excerpt from Sohoni's *The Code of Criminal Procedure 1973*, 19th edn, 1998, vol. 5 at p. 388, para 25, where it is stated as follows:

> 25. No power to allow inspection without production before Court or officer.
>
> It is not open to the Magistrate to issue an order allowing the prosecution to inspect the entries in the books of the accused relating to the subject-matter of the charge at the offices of the accused's attorneys. Such an order is not warranted by the Code and is *ultra vires*; but he may cause their production under this section in court for the purposes of using them as evidence to prove the guilt of the accused persons and in case of non-production, issue a search warrant under Section 93. If there are any documents which are relied upon by the accused either for dislodging the prosecution case or for building up his own case, he will have to take out a summons for them. **If the object of the inspection is merely to fish out for information, it is not a thing that could be permitted.** There may be documents in the custody of private individuals which may furnish necessary information for an accused, but then he can claim no right to look into them unless he takes out a summons for them and gets them into Court. If they are not produced, the proper course for him would be to move the Court to issue a search-warrant under Section 93, after satisfying the Court that they are necessary. Merely because the documents are in the custody of the Court, that will not give him a right which he would not have if the documents were in private custody. A search might also be made under Section 165. (emphasis added)

With regard to the provisions of s. 399 and 51 of the CPC it is a well recognised and established principle of statutory interpretation that where the same statute makes general provisions in respect of a particular subject matter, and makes specific provisions with respect to a special category, the latter must prevail over the general (See *Kameshwar Singh v. Province of Bihar* AIR [1950] Pat 392, 418 (SB) and a host of other cases cited in N.S. Bindra's *Interpretation of Statutes*, 8th edn, 1997 at p. 576, 4n.)

Further, I am of the view that these post-mortem reports resemble statements recorded from witnesses under s. 112 of the CPC by virtue of sub-s. (3) of s. 399 which is substantially similar to sub-s. (3) of s. 112 in that the persons making the reports are bound to state the truth in their reports. These persons who are the makers of the reports are police witnesses because the reports are made as a result of requests made by the police to them in the course of conducting investigations.

In the conclusion of the *Khoo Siew Bee* case, his Lordship Suffian LP had qualified his decision by holding that his ruling for the supply to an accused person of a certified true copy of his cautioned statement did not apply to statements recorded from others who are potential witnesses against or for the

accused person as to which the prosecution is under no duty to supply to the defence. He relied on the case of *Bryant v. Dickson* [1946] AC 146 as authority for this restriction in his ruling.

In that case his Lordship Goddard LCJ had held that there was no such duty nor has there ever been a duty on the prosecution to supply the defence with a statement which they have taken from a witness to the defence. He was of the opinion that the duty of the prosecution in such a case is only to make available to the defence a witness whom the prosecution know can, if he is called, give material evidence. He held, therefore, that the defence could call the witness, Campbell, if they liked and that the defence could have chosen to take a statement from Campbell before deciding whether to call him as their witness.

There is another aspect. It is this. It is not disputed that these reports were not in existence before the alleged commission of the offence of murder with which all the ten accused persons have been charged. These reports are, therefore, clearly distinguishable from documents seized from the custody or possession of an accused person and which are relevant to the offence with which the accused person is charged eg, the offences of cheating, forgery or criminal breach of trust and the like because the latter category of documents would form the subject matter of the charge. The post-mortem reports are not relevant to the issues for adjudication of this trial particularly the issue of the cause of death and identification of the five deceased persons whose names appear in the charge because their makers will be called by the prosecution to adduce oral evidence.

This court is aware that the ten accused persons are facing a most serious charge, ie of having committed the offence of murder, in respect of the five deceased persons where the only sentence that the court can pass is death. The defence lament that despite this they have not been informed as to the cause of death of the five deceased persons and how the prosecution intend to prove the identity of the five deceased persons because the opening statement of the prosecution, P2, is silent on these vital issues.

In my view it is open to the defence to pursue the alleged lack of material particulars or insufficiency of information in the prosecution's opening statement, P2, which the prosecution is obliged to make pursuant to s. 179(1) of the CPC, if the defence feel that it is in their best interests to do so.

I find support for my ruling in this case in the decision of the Supreme Court in *Public Prosecutor v. Raymond Chai Kim Chwee & Anor* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260. In that case the Supreme Court has laid down clearly the guidelines in respect of an application under s. 51(1) of the CPC.

There is a dichotomy in approach depending on when the application is made.

If it is made before the commencement of the trial the court has an absolute discretion to entertain the application having in mind the overriding principle of the justice of the case. An accused person should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. He is entitled to documents or materials specified or referred to in the charge. But he is not entitled to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in civil proceedings. He is also not entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge.

If it is made in the course of the trial the rule of relevancy must be strictly enforced. This means that anything may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced. By the rule of relevancy is meant the materials or documents asked for must be relevant to the issues for adjudication.

The question which arises is what do the words "relevant to the issues for adjudication mean"?

In Sarkar's *Law of Evidence*, 15 edn., vol 1, (at p. 85) it is stated that "[r]elevancy is the test of admissibility" and (at p. 87) that "[f]or all practical purposes the word 'relevant' in s. 3 of the Indian Evidence Act 1872 (which is in *pari materia* with s. 3 of our Evidence Act 1950) means what is legally admissible in evidence". (See also *Lakhmi v. Haider*, 3 CWN 268n, per Lord Hobhouse cited in *Sarkar*'s book at p. 42).

I shall now deal with the second prong of the two pronged application of the defence, ie, that the common law confers a right on the accused persons to inspect and obtain a certified true copy of each of the post-mortem reports pursuant to ss. 74 and 76 of the Evidence Act 1950.

In my view the common law does not give the accused person such a right. This view is in line with the decision of the Federal Court in *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24 which Mr. Vijandran has relied on as the lynchpin of his submissions. In that case the Federal Court had allowed the appellant's appeal that he be supplied with a certified true copy of the report made by the complainant against him alleging criminal intimidation by the appellant. The Federal Court had done so on the ground that the 1st information report is a public document within the meaning of s. 74 of the Evidence Act 1950. It is also admissible in evidence in the criminal trial under s. 77 of the Evidence Act and under s. 108A of the CPC and that the appellant or his counsel should be supplied with a copy thereof.

In the case before me the post-mortem reports are not admissible in evidence under s. 399 of the CPC because they have not been served on the accused persons at least ten days before the commencement of the trial. The question of supplying copies of these post-mortem reports to the defence does not arise at all.

In the *Khoo Siew Bee* case *(supra)* the Federal Court had also touched on the use of the cautioned statement recorded from an accused person, which the court held is a public document within the meaning of s. 74 of the Evidence Act 1950, as evidence in court. At p. 49, paras E to F in the right hand column, his Lordship Suffian LP had this to say:

> *There is no doubt that if during the trial the prosecution seeks to introduce them in evidence,* defence counsel would then in fairness be given copies or the opportunity of making copies, and a brief adjournment to take instructions. *There is also no doubt that if the prosecution elects not to introduce them in evidence, defence counsel may do it, when cross-examining the police officer who recorded the statements and by getting him to produce them in evidence (as defence exhibits) – in which case, again defence counsel would be given copies or an opportunity of making copies and a brief adjournment to take instructions.* (emphasis added)

In my opinion although the Federal Court has not expressly used the word "admissible" in this judgment this is implicit in the judgment because it is trite law that a document cannot be used as evidence in court if it is not admissible.

The identity of the maker of the document is also a material factor. This can be gleaned from the following excerpt (at the second last para on the right hand column at p. 50):

> I do not think that my ruling is unfair. *The cautioned statements have been made by the accused themselves (not by others* implicating the accused), and so there is no fear of the accused tampering with potential witnesses who have given information against them. Also, the statements have been signed by the accused (section 112(v). Criminal Procedure Code), and so it will be difficult for them to depart radically from what has been recorded. (emphasis added)

There is again another important aspect. It is this. If a medical report is about an accused person in the sense that it is made after a medical examination of the accused person, the accused person is also entitled to inspect it and obtain a certified true copy. This is clear from *Toh Kong Joo v. Penguasa Perubatan Hospital Sultanah Aminah, Johore Bahru* [1990] 1 CLJ 1001. The reason is because the medical report is a public document within the meaning of s. 74 of the Evidence Act 1950 and "the applicant definitely has an interest in his own medical report and it is obvious that he needs a copy of the report to protect his own interest especially when he has made the allegation that he was beaten by the police "(at p. 1003)". In my opinion, this decision is in line with the established authorities of *Anthony Gomez v. Ketua Polis Daerah Kuantan (supra)* and *Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur (supra)* being an allowable extension of the established principle of the common law right of an accused person to inspect a public document because

of the discernible material link between what is said to be an accused person's common law right to inspect and obtain a certified true copy of a public document pursuant to s. 76 of the Evidence Act and whether the document can be used in evidence either against or for the accused person in a trial.

In the case before me, the post-mortem reports, which the learned DPP has rightly conceded are public documents within the meaning of s. 74 of the Evidence Act 1950 and that the rationale concerning the existence of a real fear or danger of tampering with witnesses does not arise for reasons already stated earlier in my decision, are not admissible as evidence under the Evidence Act 1950 by virtue of s. 399 of the CPC since the precondition as to their prior service has not been established by the defence in this application. Thus, it cannot be said that the accused persons have an interest in the post-mortem reports and require their inspection and that they be supplied with certified true copies of the post-mortem reports in order to protect their interests.

I would like to state here that from my reading and interpretation of the *ratio decidendi* and *obiter dicta* of the Federal Court in the *Anthony Gomez* and *Khoo Siew Bee* cases *(supra)* I am convinced that an accused person who is relying on his common law right to inspect a document must satisfy the court first that it is a public document within the meaning of s. 74 of the Evidence Act 1950 and that he has an interest in the document concerned and that he requires inspection of and a certified true copy of that document for the protection of his interest. In order to satisfy the court he must show the following:

(a) it is a first information report (as was decided in the *Anthony Gomez* case *(supra)*); or

(b) made by him like his cautioned statement (as was decided in the *Khoo Siew Bee* case *(supra)*; or

(c) his uncautioned statement (as was decided in *Haji Abdul Ghani bin Ishak v. Public Prosecutor* [1980] 2 MLJ 196); or

(d) concerns him directly like his medical report (as was decided in the *Toh Kong Joo case (supra)*); or

(e) any other like document which is admissible in evidence either for the prosecution or the defence,

unless the defence requires the document for purposes of impeachment proceedings pursuant to s. 145 of the Evidence Act 1950 in which event the well recognised and established procedure for impeachment as laid down by the court in *Muthusamy v. Public Prosecutor* [1948] 14 MLJ 57 is applicable (as was decided by the Federal Court in the *Husdi* case *(supra)* in respect of statements from police witnesses recorded under s. 112 of the CPC).

I shall now deal with the third category of documents which the defence has applied for, ie the chemist reports, the report of the forensic pathologist, the report of the dental expert and the DNA profiling reports.

In my view these are also not admissible for the same reasons as the post-mortem reports and my reasons for disallowing the application of the defence in respect of the post-mortem reports also apply to the 3rd category of reports.

In the ultimate analysis, I am of the respectful view that although in the case of post-mortem reports, chemist reports, DNA profiling reports, dental reports and the like there is no real risk or danger of tampering with witnesses bearing in mind that the makers are neutral witnesses being professional witnesses, on the authority of *Bryant v. Dickson* cited with approval in the *Khoo Siew Bee* case there is no duty on the part of the prosecution to supply the defence with copies of the reports.

With regard to s. 399 and s. 51 of the CPC and in the light of the Federal Court decisions in the *Husdi*'s case *(supra)* and the *Raymond Chia* case the statements recorded by the police under s. 112 of the CPC and the post mortem reports, etc which form the subject matter of the defence's application before me, can be supplied to the defence for purposes of impeachment proceedings if they are proved in which event the case of *Muthusamy v. Public Prosecutor (supra)* applies.

In view of my ruling, the defence will have to wait until the prosecution calls the experts concerned to testify in court. The defence can always apply to the court for the case to be stood down or adjourned if necessary before proceeding with cross-examination if they feel that they require time to consult with their own experts and that it is impractical or too costly for their experts to sit in during the testimony of the prosecution's experts.

The defence can be rest assured that their application will be considered sympathetically in the interests of justice.